

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
RSR CORPORATION, et al.,  
Defendants.

CASE NO. C00-890JLR

## 1. INTRODUCTION

This matter comes before the court on a motion for summary judgment from Defendants RSR Corporation (“RSR”), Quemetco, Inc. (“Quemetco”), and Quemetco Realty, Inc. (“Quemetco Realty”) (Dkt. # 79); and a motion for summary judgment from the United States (“Government”) (Dkt. # 78). The court initially considered the parties’ briefing and supporting documentation and issued a tentative order (Dkt. # 87) to guide the parties at oral argument. After oral argument, the court ordered supplemental briefing, which the court has received and considered. For the reasons stated below, the court DENIES the Defendants’ motion for summary judgment and GRANTS the Government’s motion.

## 1 II. BACKGROUND

2 The parties should read this order in conjunction with the court's tentative order,  
3 and the court will use the shorthand it adopted in its tentative order here. In the tentative  
4 order, the court summarized the factual background relevant to these motions and  
5 indicated its intent to grant Defendants' summary judgment motion unless the  
6 Government was able to persuade the court otherwise at oral argument.  
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8 The Government took two approaches in response to the tentative order. First, it  
9 attempted to persuade the court to adopt different legal reasoning with respect to the  
10 court's conclusion that this lawsuit is not a remedial CRA, and thus is not subject to the  
11 six-year statute of limitations in 42 U.S.C. § 9613(g)(2)(B). The court is not persuaded,  
12 and now adopts Part III.A-D and Part III.F of the tentative order as a component of its  
13 final ruling on Defendants' motion. This lawsuit is not a remedial CRA.  
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15 In its second approach, the Government argued that even if this lawsuit is a  
16 removal CRA, it is timely because the Government filed suit within three years of the  
17 completion of removal action at the SGOU. Before oral argument, the Government filed  
18 a declaration (Dkt. # 88) containing evidence that was not part of the record before the  
19 court, although it was part of the SGOU administrative record. The Government's sole  
20 justification for not timely submitting this evidence was that it believed that the argument  
21 that this lawsuit is a timely remedial CRA was "a winner" and thus it did not need to  
22 support its alternate argument that this lawsuit is a timely removal CRA.  
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24 The court finds the Government's litigation strategy to be dubious at best, but will  
25 nonetheless consider the late-submitted evidence. The Government's choice to place its  
26 proverbial eggs in the remedial CRA basket could have been fatal to this lawsuit, and  
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1 only the court's strong preference for deciding this matter on its merits leads it to exercise  
2 its discretion to consider the Government's new evidence.

3 The new evidence provides the factual background for this order. After entering  
4 the consent decree, the settling PRPs began implementing the remedy the Government  
5 selected in the January 1996 ROD. For example, Seattle Iron & Metals Corporation  
6 ("SIMC") conducted soil sampling to identify contamination "hot spots" in accordance  
7 with the Government's April 1997 plan for soil sampling and analysis. SIMC reported  
8 the results of the sampling in February 1998 ("SIMC Report"). Thompson Supp. Decl.,  
9 Ex. 1. Another group of settling PRPs, the Harbor Island PRP Group, submitted a "30%  
10 Remedial Design Report" in March 1998. Thompson Supp. Decl., Ex. 2. That report  
11 detailed the Group's largely conceptual work on implementing the Government's selected  
12 remedy. In September 1998, Todd Pacific Shipyards ("Todd Pacific") submitted a "100%  
13 Design" for the recovery of petroleum contaminants in groundwater on its property.  
14 Thompson Supp. Decl., Ex. 3.

### 17 III. ANALYSIS

#### 18 A. **The Government's New Evidence Shows that Removal Action at the SGOU 19 Ended After May 1997.**

20 The issue now before the court is when removal action at the SGOU ended. As  
21 explained in the tentative order, this lawsuit is a timely removal CRA only if removal  
22 ended on May 22, 1997 or later. The Government argues that its new evidence shows  
23 that removal activity as to the SGOU soils ended in September 1998 with the submission  
24 of the Todd Pacific 100% Design report, and that removal activity as to the SGOU  
25 groundwater is still ongoing, because the settling PRPs have yet to conclude their design  
26 investigation. Defendants do not dispute that the activity chronicled in the Government's  
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1 new evidence actually occurred. The question before the court is thus purely legal: Was  
 2 any of the remedial design work at the SGOU after May 1997 removal activity?<sup>1</sup>

3 The court must answer this question in the Government's favor if even one action  
 4 taken at the SGOU after May 1997 qualifies as removal activity. Courts have  
 5 consistently interpreted CERCLA to permit only a single "removal action" for a site.  
 6 E.g., Colorado v. Sunoco, Inc., 337 F.3d 1233, 1241 (10th Cir. 2003); see also Kelley v.  
 7 E.I Dupont de Nemours & Co., 786 F. Supp. 1268, 1276-77 (E.D. Mich. 1992) (rejecting  
 8 defendants' argument that response constituted two or three separate removal actions),  
 9 aff'd 17 F.3d 836 (6th Cir. 1994). The Ninth Circuit has never considered this "single  
 10 removal rule," but the court assumes that it would adopt it, following virtually every other  
 11 court that has faced the issue. Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.,  
 12 308 F. Supp. 2d 1124, 1132-33 (C.D. Cal. 2004) (reviewing cases adopting single  
 13 removal rule and noting that in CERCLA's history, only one court has ever made an  
 14 exception). Under this rule, if any response action at the SGOU after May 1997 was  
 15 removal activity, the removal action at the SGOU ended after May 1997, and this lawsuit  
 16 is timely.

17 The court turns first to SIMC's sampling and evaluation of soil at its SGOU  
 18 property as a candidate for a timely removal activity. SIMC sampled soils from May 13-  
 19 15, 1997 and during the week of November 17, 1997. SIMC Report at 5. SIMC  
 20 conducted the sampling to identify soil "hot spots" that would require excavation and  
 21 treatment under the Amended ROD. SIMC Report at 2. SIMC found soil with  
 22 contaminant levels exceeding hot spot criteria, but also found that the contaminated soil  
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 26 <sup>1</sup>As noted in the tentative order, characterizing activity as "removal" or "remedial" is a  
 27 question of law, not a question of fact. Advanced Micro Devices, Inc. v. Nat'l Semiconductor  
 28 Corp., 38 F. Supp. 2d 802, 809 (N.D. Cal. 1999).

1 was not present in discrete hot spots. SIMC Report at 19. SIMC conducted the sampling  
2 and provided the report to “support remedial design efforts for the SIMC properties as a  
3 component of efforts for the [SGOU].” SIMC Report at 1.

The SIMC soil sampling fits CERCLA's definition of removal activity. Removal action includes "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . ." § 9601(23).<sup>2</sup> As part of a larger effort to design and implement the remedy the Government selected in the amended ROD, SIMC assessed and evaluated the soil on its property for hazardous substances, including petroleum compounds and polychlorinated biphenyl compounds. SIMC Report at 2-5. Other courts have held that similar post-ROD activities are removal actions. E.g., United States v. Akzo Nobel Coatings, Inc., 990 F. Supp. 897, 907 (E.D. Mich. 1998) (interpreting § 9601(23) to cover "site investigation and study" as a component of "remedial design"); United States v. Atlantic Richfield, 147 F. Supp. 2d 614, 621 (S.D. Tex. 2001) (characterizing the installation of air monitoring platforms after ROD as removal activity); Louisiana v. Braselman Corp., 78 F. Supp. 2d 543, 549 (E.D. La. 1999) (holding that post-ROD construction and evaluation of two on-site extraction systems "was part of the design investigation, not a permanent remedy").

On the other hand, the SIMC soil sampling meets the definition of remedial activity as well. CERCLA defines remedial activities as “actions consistent with permanent remedy taken instead of or in addition to removal actions . . . includ[ing] . . . any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.” § 9601(24). There is little question that SIMC’s efforts to implement the permanent remedy the Government selected in the amended

<sup>2</sup>Unless otherwise noted, all statutory references are to Title 42 of the United States Code.

1 ROD are “consistent with permanent remedy,” and monitoring soil to determine which  
2 areas required more extensive “hot spot” remediation seems reasonably required to  
3 protect the environment. But see Atlantic Richfield, 147 F. Supp. 2d at 621 (finding that  
4 monitoring undertaken prior to on-site construction of a remedial action is not remedial  
5 action under § 9601(24)). In addition, a few courts have characterized post-ROD  
6 remedial design work as remedial action. E.g., California v. Cetor Chem. Corp., 901 F.  
7 Supp. 1481, 1488 (N.D. Cal. 1995); United States v. Petersen Sand & Gravel, Inc., 824 F.  
8 Supp. 751, 755 (N.D. Ill. 1992).

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10 The court holds that SIMC’s soil sampling was removal action, and may have been  
11 remedial action as well. Other courts have recognized that some response actions can be  
12 both remedial and removal actions under CERCLA’s broad definition of each term.  
13 Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 926 (5th Cir. 2000) (“[T]he  
14 CERCLA definitions are expansive enough that certain activities may well be covered by  
15 both.”); California v. Neville Chem. Co., 213 F. Supp. 2d 1115, 1127 (C.D. Cal. 2002)  
16 (citing Geraghty & Miller and noting that “[t]he difficulty presented by these two  
17 definitions is that they both may cover the same activity.”); Public Serv. Co. v. Gates  
18 Rubber Co., 175 F.3d 1177, 1182 (10th Cir. 1999) (“Elements of either response action  
19 may overlap and semantics often obscure the actual nature of the cleanup performed.”).  
20 Because SIMC’s activities in May and November 1997 fit within the amorphous  
21 boundaries of “removal action” articulated in CERCLA and cases interpreting it, the court  
22 holds that removal action at the SGOU continued until at least November 1997. The  
23 court need not reach Defendants’ contention that the activity was remedial. See Hatco  
24 Corp. v. W.R. Grace & Co.-Conn., 849 F. Supp. 931, 962 (D.N.J. 1994) (“A response  
25 action may constitute both a removal and a remedial action, and a court is not constrained  
26 to find either term applicable at the expense of the other.”).  
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1 Both parties advocate a cleaner distinction between removal and remedial action,  
2 relying in part on California v. Neville Chem. Co., 358 F.3d 661 (9th Cir. 2004). The  
3 Government argues that remedial action cannot begin until the completion of remedial  
4 design. Gov't Supp. Brief at 4 (citing Neville). The Neville court, however, merely  
5 noted that the “commencement of on-site construction of remedial action” cannot occur  
6 until after the remedy is designed. 358 F.3d at 668 n.5 (citing H.R. Rep. 99-253(III)).  
7 This component of the Neville decision merely addresses the triggering event for the  
8 statute of limitations for a remedial CRA, i.e. the “on-site construction of the remedial  
9 action” in § 9613(g)(2)(B). The Neville court had no occasion to characterize activity  
10 that occurs before the on-site construction of remedial action, but after the selection of a  
11 final remedy in a ROD. Moreover, the Neville court expressly rejected the “final  
12 remedial design” as the “pivotal event” for defining the initiation of a remedial action. Id.  
13 at 671. Neville does not support the Government’s contention that final remedial design  
14 is the pivotal event for defining the conclusion of removal action.  
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16 Defendants seek a line of demarcation based on Neville as well. They contend  
17 that activities “consistent with the permanent remedy” are remedial actions, and actions  
18 aimed at a “more temporary objective” are removal actions. Defs.’ Supp. Brief at 7.  
19 They correctly note that Neville held that actions consistent with the permanent remedy  
20 are remedial (358 F.3d at 667), and that the permanent remedy is the “final remedial  
21 action plan,”<sup>3</sup> not the final remedial design (358 F.3d at 670 n.7). Indeed, consistency  
22 with the final remedial action plan is the hallmark of remedial action under Neville. The  
23 court noted, for example, that CERCLA lists the “provision of alternative water supplies”  
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27 <sup>3</sup>The Neville court’s review of the regulations for selecting and implementing a CERCLA  
28 remedy demonstrates that, in this case, the “final remedial action plan” is the amended ROD. 358  
F.3d at 670 n.7.

1 as both a removal activity under § 9601(23) and a remedial activity under § 9601(24). Id.  
 2 at 667. The court explained that providing alternate water supplies “consistent[ly] with  
 3 permanent remedy” would be remedial activity, whereas providing alternate water  
 4 supplies “on a more temporary basis” would be removal activity. Id.

5       In light of Neville, the court acknowledges the intuitive appeal of Defendants’  
 6 proposed bright-line rule in which any action consistent with the permanent remedy is  
 7 remedial activity *and not removal activity*. The Neville court, however, did not reach as  
 8 far. As a matter of logic, its holding that actions consistent with the permanent remedy  
 9 are remedial does not exclude those actions from the realm of removal activity.  
 10 Moreover, its holding expressly acknowledges that removal activity can continue after the  
 11 adoption of a final remedial action plan. Id. at 670. Unfortunately, the Neville court had  
 12 no need to explain how to identify such removal activity,<sup>4</sup> nor to comment on whether  
 13 such activity might be both removal and remedial activity. Although the Defendants’  
 14 proposed dividing line between removal and remedial activity is not inconsistent with the  
 15 Neville court’s reasoning, the court declines to extend Neville beyond its boundaries.  
 16 The court is thus left with the “vague and overlap[ping]” definitions of removal and  
 17 remedial activity in CERCLA (Alco Pacific, 308 F. Supp. 2d at 1137), and its conclusion  
 18 that the SIMC soil sampling falls within the overlap.

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21       22 The Neville court’s only examples of removal action occurring after a remedial action  
 23 plan were two response actions that the Sunoco court characterized as removal actions. 358 F.3d  
 24 at 670 (citing Sunoco, 337 F.3d at 1244). This court has reviewed Sunoco, and it is not clear that  
 25 either of the actions that court identified occurred after the adoption of a remedial action plan.  
 26 One of the removal actions, plugging a mine adit, occurred before the government even placed the  
 27 site in question on the National Priorities List (“NPL”). Sunoco, 337 F.3d at 1237. The other,  
 28 construction of monitoring wells, took place in the same year. Id. at 1237-38. The Sunoco court  
 did not identify the date on which the government adopted a final remedial action plan, if ever.  
Id. at 1237 (noting that the government “issued four Interim Records of Decision” and that “the  
final site-wide remedy is still in the planning stages”). It seems unlikely that the government  
approved a final remedial action plan within ten months of placing the site on the NPL.

1       The court declines to erect a new boundary between removal and remedial action  
2 not only because the Neville court did not do so, but also in deference to the  
3 commandment that it construe CERCLA's statute of limitations strictly in favor of the  
4 Government. Neville, 358 F.3d at 666; California v. Montrose Chem. Co., 104 F.3d  
5 1507, 1513 (9th Cir. 1997). CERCLA's definitions of "remedial" and "removal" do not  
6 cleave response actions neatly into two mutually exclusive subsets. The court has  
7 approached the difficult questions of statutory interpretation here as both a grammarian  
8 and a logician, and wholeheartedly agrees with the observation that "neither a logician  
9 nor a grammarian will find comfort in the world of CERCLA." Carson Harbor Vill. Ltd.  
10 v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001). This court's journey through the  
11 CERCLA "maze" (*id.* at 880) leads it to the conclusion that SIMC's soil sampling was  
12 removal activity, no matter what else it might have been. As SIMC performed part of the  
13 sampling in November 1997, less than three years before the Government filed this  
14 lawsuit, this is a timely removal CRA under § 9613(g)(2)(A).

15      **B. The Defendants Do Not Need Additional Discovery.**

16      Defendants request additional discovery into the post-ROD actions of the settling  
17 PRPs. They claim that the Government has consistently characterized all post-ROD  
18 response actions at the SGOU as remedial action,<sup>5</sup> and that it has only recently reversed  
19 course to avoid summary judgment.

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25      <sup>5</sup>Defendants' repeatedly claim that Keith Rose, the Government's representative under  
26 Fed. R. Civ. P. 30(b)(6), bound the Government to the position that all post-ROD action at the  
27 cite was remedial. They base the claim entirely on Mr. Rose's "admission" that he characterized  
28 certain response activities as "remedial." The court has reviewed Mr. Rose's testimony and finds  
that he was, at best, offering a legal conclusion. A witness's legal conclusions cannot bind a  
party.

1       Discovery into the settling PRPs' actions would serve no purpose. As noted  
2 above, as long as a single settling PRP undertook a single removal action at the SGOU  
3 after May 1997, this action is timely. Faced with the SIMC Report, Defendants do not  
4 argue that the report inaccurately describes the soil sampling at the SGOU. Absent some  
5 indication that SIMC submitted a false (and thus fraudulent) report, there is no need for  
6 further discovery on the issue. Defendants' statute of limitations defense fails as a matter  
7 of law, and thus further discovery would be of no value.

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9 **C. The Court Grants the Government's Summary Judgment Motion on Liability.**

10       The Government seeks summary judgment that it has made a *prima facie* case that  
11 Defendants are liable for response costs at the SGOU. If the Government wins summary  
12 judgment, the only remaining issues in this action would be the amount of response costs  
13 owing, and whether Defendants have valid affirmative defenses.

14       To establish a *prima facie* case of liability under CERCLA, the Government must  
15 prove that a "release" or threatened release of hazardous substances occurred at a  
16 "facility" and the Government incurred costs in responding to the release or threatened  
17 release. United States v. Chapman, 146 F.3d 1166, 1169 (9th Cir. 1998) (citing § 9607).  
18 If the Government proves these elements, then it need only show that the Defendant falls  
19 within one of four categories of PRPs under § 9607(a). Id.

20       Much of the Government's *prima facie* case is undisputed. The lead smelter that  
21 Defendants owned and operated is unquestionably a facility within the meaning of  
22 CERCLA. As owners and operators of the facility, Defendants are PRPs under  
23 § 9607(a)(1). Defendants do not contest that the Government has incurred response costs  
24 (in the form of unreimbursed removal costs) at the SGOU.

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1 Defendants attempt to raise a dispute over whether their facility released a  
2 hazardous substance, but that dispute reduces solely to how much lead their smelter  
3 released and the magnitude of that release in comparison to other PRPs. Although this  
4 dispute may be relevant to other issues in this case, it is of no value in opposing the  
5 instant summary judgment motion. Defendants have admitted that their lead smelter  
6 released lead at Harbor Island. Carman Decl. Ex. 7 (Response to Request for Admission  
7 No. 22).

8 As the facts underlying the Government's prima facie case are not in dispute, the  
9 court grants its motion for summary judgment. In granting the motion, the court  
10 emphasizes it does not reach Defendants' argument for limitation of response costs, their  
11 argument that they are entitled to credit for costs that the settling PRPs have already paid,  
12 their opposition to joint and several liability, or any of Defendants' purported affirmative  
13 defenses other than its statute of limitations defense.

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#### 15 **IV. CONCLUSION**

16 For the reasons stated above, the court DENIES Defendants' motion for summary  
17 judgment (Dkt. # 79) and GRANTS the Government's motion (Dkt. # 78).

18 The court also DENIES Defendants' motion for an extension of time to file  
19 motions in limine (Dkt. # 94). Defendants filed motions in limine on September 9, 2005,  
20 and it thus appears that this motion is moot. The court directs the parties to consider the  
21 motions in limine that they have filed and to withdraw any motions that this order renders  
22 moot. If this order raises new issues that the parties could not have anticipated before the  
23 deadline for motions in limine, they may arrange a teleconference with the court to  
24 discuss the possibility of filing additional motions in limine.

25 This case is set for a bench trial on October 18, 2005. The court directs the parties  
26 to meet and confer to prepare a joint statement of issues to be presented at the bench trial,

1 and to identify each issue as a legal issue or issue of fact. If the parties are unable to  
2 agree, they shall indicate their disagreements in the joint submission. The submission  
3 shall indicate which issues require in-court witness testimony, and which do not. The  
4 parties shall file this joint submission no later than September 28, 2005.<sup>6</sup>

5 DATED this 15th day of September, 2005.  
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9 JAMES L. ROBART  
10 United States District Judge  
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23 <sup>6</sup>In response to the court's request for supplemental briefing, the Defendants submitted a  
24 19-page brief containing 50 footnotes. Estimating conservatively, the footnotes contain five times  
25 as much text as the main body of the brief. Indeed, it would be more accurate to state that the  
26 footnotes *are* the main body of the brief. E.g., Defs.' Supp. Brief at 4 (page contains 3 lines of  
27 main text and 35 lines of footnote text). The court notes that Defendants' other submissions to  
28 the court are similar. E.g., Defs.' Summ. Judg. Mot. (motion contains 58 footnotes in 19 pages).  
This is an unsubtle means of subverting the court's page limits for briefs, and the court cautions  
counsel to use footnotes appropriately in future submissions to the court.